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IN THE

Supreme Court of the United States

GARRISON S. JOHNSON

Petitioner,

v.

CALIFORNIA

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, DELAWARE, IDAHO, NEVADA, NEW HAMPSHIRE AND NORTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

GENE C. SCHAERR*
ROBERT KLINCK
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TROY KING
ATTORNEY GENERAL OF
ALABAMA
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

GREGG D. RENKES
ATTORNEY GENERAL
STATE OF ALASKA
P.O. Box 110300
Juneau, AK 99801
(907) 465-2133

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

ATTORNEY GENERAL
BRIAN SANDOVAL
STATE OF NEVADA
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

KELLY A. AYOTTE
ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE
33 Capitol Street
Concord, NH 03301
(603) 271-3655

WAYNE STENEHJEM
ATTORNEY GENERAL OF
NORTH DAKOTA
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

QUESTION PRESENTED

Should this Court create an equal protection "exception" to the deferential standard adopted in *Turner* v. *Safley*, 482 U.S. 78 (1987) for assessing constitutional claims by prison inmates?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
STATEMENT OF FACTS	5
ARGUMENT	5
I. UNDER THE COURT'S PRECEDENTS, *TURNER*'S REASONABLENESS STANDARD APPLIES TO EQUAL PROTECTION CLAIMS AS WELL AS OTHER CONSTITUTIONAL CLAIMS.	5
A. As This Court Has Repeatedly Emphasized, *Turner* Provides A Unitary Standard of Review For All Prison-Based Constitutional Claims.	6
B. This Court's Precedents Provide No Basis For An "Equal Protection Exception" To The *Turner* Standard.	11
II. APPLICATION OF THE *TURNER* STANDARD TO EQUAL PROTECTION CLAIMS OF THE SORT RAISED BY PETITIONER IS ESPECIALLY JUSTIFIED.	15
A. The *Turner* Standard Is Necessary To Ensure That Prison Authorities Can Address The Urgent Problem Of Race-Related Prison Violence.	16

TABLE OF CONTENTS-continued

Page

B. The *Turner* Standard Is Sufficient To Prevent Invidious Discrimination. 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES Page

Adarand Constrs., Inc. v *Pena*, 515 U.S. 200 (1995) 14
Atwater v. *City of Lago Vista*, 532 U.S. 318 (2001) 24
Black v. *Lane*, 824 F.2d 561 (7th Cir. 1987) 24
City of Cleburne, Tex. v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) 23
City of Newport, Ky. v. *Iacobucci*, 479 U.S. 92 (1986) 11
City of Richmond v. *J. A. Croson Co.*, 488 U.S. 469 (1989) 14
Dawson v. *Delaware*, 503 U.S. 159 (1992) 16
Gratz v. *Bollinger*, 539 U.S. 244 (2003) 14
Grutter v. *Bollinger*, 539 U.S. 306 (2003) 14
Hudson v. *Palmer*, 468 U.S. 517 (1984) 9
Johnson v. *California*, 321 F.3d 791 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 1505 (2004) ..... *passim*
Jones v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) 9, 21, 25
Lee v. *Washington*, 390 U.S. 333 (1968) 3, 5, 12, 24
Lewis v. *Casey*, 518 U.S. 343 (1996) 11, 22, 23
McKune v. *Lile*, 536 U.S. 24 (2002) 11
Metro Broad., Inc. v. *FCC*, 497 U.S. 547 (1990). 14
Morrison v. *Garraghty*, 239 F.3d 648 (4th Cir. 2001) 5, 25
O'Lone v. *Estate of Shabazz*,482 U.S. 342 (1987) 10
Overton v. *Bazzetta*, 539 U.S. 126 (2003) 6, 11
Pell v. *Procunier*, 417 U.S. 817 (1974) 1, 22
Pitts v. *Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) 23
Procunier v. *Martinez*, 416 U.S. 396 (1974) 8, 22
Robinson v. *Prunty*, 249 F.3d 862 (9th Cir. 2001) 20
Schenck v. *United States*, 249 U.S. 47 (1919) 6
Shaw v. *Murphy*, 532 U.S. 223 (2001) ..... *passim*
Sockwell v. *Phelps*, 20 F.3d 187 (5th Cir. 1994) ... 24

TABLE OF AUTHORITIES-continued

	Page
State v. *Kell*, 61 P.3d 1019 (Utah 2002)	17, 18
Stefanow v. *McFadden*, 103 F.3d 1466 (9th Cir. 1996)	16
Thornburgh v. *Abbott*, 490 U.S. 401 (1989)	*passim*
Turner v. *Safley*, 482 U.S. 78 (1987)	*passim*
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)	11
Washington v. *Harper*, 494 U.S. 210 (1990)	*passim*
Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968)	2, 12
White v. *Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993)	21

SCHOLARLY AUTHORITIES

Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. & Criminology 127 (2001)	18
Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 Am. U. L. Rev. 41 (1987)	17, 19
Scott N. Tachiki, Comment, *Indeterminate Sentences In Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination Of Procedural Protection And A Proposal For Greater Procedural Requirements*, 83 Cal. L. Rev. 1115 (1995)	17

TABLE OF AUTHORITIES-continued

OTHER AUTHORITIES

	Page
John J. DiIulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* (1987)	19
Martha Henderson et al., *Race, Rights, And Order In Prison: A National Survey Of Wardens On The Racial Integration Of Prison Cells*, 80 The Prison Journal 295 (2000)	20
Human Rights Watch, United States, *No Escape: Male Rape in U.S. Prisons* (2001), *available at* http://www.hrw.org/reports/2001/prison/report.html	18
John Irwin, *The Felon* (1970)	17
James B. Jacobs, *New Perspectives on Prisons and Imprisonment* (1983)	*passim*
Micha Maguire, *Racism II, in Inside: Prison American Style* 84 (Robert J. Minton, Jr. ed., 1971)	19
National Criminal Justice Reference Service, *Gang Resources, available at* http://www.ncjrs.org/gangs/summary.html (last visited Aug. 6, 2004)	17
Frank Rundle, *The Roots of Violence at Soledad, in The Politics of Punishment: A Critical Analysis of Prisons in America* 163 (Erik Olin Wright, ed. 1973)	19

INTERESTS OF *AMICI CURIAE*

Amici States strongly oppose the efforts by Petitioner and his *amici* to create piecemeal exceptions to the rule of *Turner* v. *Safley*, i.e., that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). That rule is based upon this Court's correct conclusion that judgments about prison security "are peculiarly within the province and professional expertise of corrections officials," *Pell* v. *Procunier,* 417 U.S. 817, 827 (1974), and that federal courts should give those officials wide deference "to deal with the increasingly urgent problems of prison administration and reform." *Turner,* 482 U.S. at 84.

Consistent with these principles, this Court has repeatedly instructed that *Turner* establishes "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Shaw* v. *Murphy,* 532 U.S. 223, 229 (2001). Thus, with the possible exception of claims under the Eighth Amendment, the *Turner* standard "applies to *all circumstances* in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper,* 494 U.S. 210, 224 (1990) (emphasis added). In light of these clear and consistent instructions, *amici* States have repeatedly relied upon the *Turner* reasonableness standard in formulating and implementing prison policy.

Petitioner and his *amici*, however, now seek to limit *Turner*. Today they seek an exception for claims arising under the Equal Protection Clause of the Fourteenth Amendment. But tomorrow they and their allies will undoubtedly seek other such exceptions which will, in the aggregate, swallow the *Turner* rule and ultimately destroy it.

Indeed, Petitioner has provided no limiting principle to his assertion that rights based on equal protection warrant strict security. He has merely cited this Court's precedents holding that racial classifications that occur *outside* prison are subject

to strict scrutiny. But *Turner* is premised on the unyielding fact that the administration of a prison, unlike other public institutions, is an "inordinately difficult undertaking." *Turner*, 482 U.S. at 85. To subject *any* prison-based constitutional challenges to strict scrutiny would make that undertaking nearly impossible.

Moreover, the same concerns that prompted this Court to adopt the *Turner* standard in the context of First Amendment and due process claims apply with equal force to prison-based equal protection challenges. Racially segregated gangs remain the reality in prisons throughout the country. And racially motivated violence, including rape and murder, is one of the most intractable problems of prison administration. It is no exaggeration to say that, in this context, the discretion given to prison administrators under the *Turner* standard could well be necessary to protect the health and, indeed, the lives of many prison inmates.

Amici States' opposition to piecemeal exceptions to the *Turner* standard is consistent with their steadfast conviction that invidious discrimination is inimical to a free society and should be eradicated. Thus, *amici* States continue to embrace the central teaching of *Washington* v. *Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968)—that a policy of "complete and permanent" segregation of prisoners violates the Equal Protection Clause. 263 F. Supp. at 331. Moreover, *amici* States neither support nor condone any kind of invidious discrimination in prisons or elsewhere. All that *amici* ask is that their prison officials be given discretion to consider race on a temporary basis when they reasonably conclude that considerations of prison safety justify it.

SUMMARY OF ARGUMENT

I. In *Turner* v. *Safley*, this Court resolved any doubt as to the standard of review that applies to the constitutional claims of prison inmates: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. In *Turner*, the Court did not distinguish among constitutional rights and gave no indication that equal protection claims were exempted from the reasonableness standard.

Moreover, the rationale underlying *Turner*—that the uniquely volatile nature of the prison environment makes deference to prison authorities necessary—clearly applies to all constitutional claims, including equal protection claims. And this Court's subsequent decisions have solidified *Turner*'s conclusion that *all* constitutional claims by prison inmates are subject to a reasonableness inquiry. *See, e.g.*, *Shaw* v. *Murphy*, 532 U.S. 223, 229 (2001); *Washington* v. *Harper*, 494 U.S. 210, 224 (1990). Accordingly, *Turner* and its progeny make clear that when a prisoner challenges a prison policy arguing that it violates his equal protection rights, the federal courts are to review the policy only to determine whether it is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

Contrary to Petitioner's position, *see* Pet'r Br. at 24-27, this Court has never held or suggested that prison-based racial equal protection claims are subject to strict scrutiny. Petitioner relies most heavily on *Lee* v. *Washington*, 390 U.S. 333 (1968) (per curiam), asserting that the *Lee* Court applied strict scrutiny. But *Lee* neither expressly nor implicitly applied strict scrutiny to prison-based equal protection claims. Instead, the Court held only that "complete and permanent" segregation of the entire Alabama prison system was unconstitutional. *Id.*

Petitioner and his *amici* also rely heavily on the fact that, outside the prison context, this Court has sometimes used the unqualified language of color-blindness in dealing with affirmative action claims. But nothing in these cases suggests this Court intended to overrule *sub silentio*, the Court's holding in *Turner* and its progeny that, in the uniquely volatile prison context, the "reasonable relationship" test applies to "*all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper*, 494 U.S. at 224 (emphasis added).

II. Creating an equal-protection "exception" to *Turner* would also be inappropriate as a matter of policy. Racially motivated violence remains one of the most intractable problems in American prisons. Indeed, even Petitioner and his *amici* cannot dispute that prisons in many states are dominated by prison gangs broken down along racial lines. Nor can they dispute that racial violence is a very real problem facing prison officials.

Accordingly, there can be no serious question that prison administrators need the discretion they are given under *Turner* to address directly the threat of racial violence. Given the severity of this problem, it is especially important that prison administrators not be confined by "inflexible strict scrutiny analysis," which "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89.

While the *Turner* standard is necessary to give prison administrators discretion to address the problem of racial violence, it would not give prison administrators unchecked authority to trample on the rights of prison inmates. *Turner* is sufficiently rigorous to ensure that prison administrators are not making racial classifications unrelated to legitimate penological objectives. Indeed, courts applying *Turner* have concluded that some prison policies are not, in fact, sufficiently related to a legitimate penological interest to

survive scrutiny. *See, e.g.*, *Morrison v. Garraghty*, 239 F.3d 649 (4th Cir. 2001). The *Turner* standard would thus not condone complete and permanent segregation of the races, *Lee*, 390 U.S. at 333-34, nor would it allow for the preferential treatment of any race, *Johnson* v. *California*, 321 F.3d 791, 799 n.7 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 1505 (2004).

In short, there simply is no reason, in law or policy, to start down the slippery slope of creating piecemeal "exceptions" to the *Turner* standard.

STATEMENT OF FACTS

Amici adopt the statement of facts in Respondent's brief.

ARGUMENT

I. UNDER THIS COURT'S PRECEDENTS, *TURNER*'S REASONABLENESS STANDARD APPLIES TO EQUAL PROTECTION CLAIMS AS WELL AS OTHER CONSTITUTIONAL CLAIMS.

This Court has clearly and consistently held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). With equal clarity and consistency, as shown below, this Court has rejected every effort and declined every opportunity to confine *Turner* to a subset of constitutional challenges, and has instead treated *Turner* as "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001).

Petitioner asks this Court to undo what *Turner* wrought, namely, a workable and constitutionally sound affirmation of the rights of prisoners against arbitrary or irrational governmental policies or practices. Under *Turner*, the rights of prison inmates, like the rights of free men, are absolutely

protected against arbitrary or irrational state action. But that affirmation of constitutional rights takes into account, as any standard of review must, the fact that rights always depend to some degree on the context within which they are exercised. *See, e.g.*, *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends upon the circumstances in which it is done."). In *Turner*, the Court acknowledged that the prison context is a uniquely problematic one and calls for a unique circumscription of constitutional rights. As shown below, there is nothing in this Court's decisions, before or after *Turner*, remotely to suggest that prison-based racial equal protection claims are, or should be, subject to a different standard.

A. As This Court Has Repeatedly Emphasized, *Turner* Provides A Unitary Standard Of Review For All Prison-Based Constitutional Claims.

The *Turner* Court resolved any question as to what standard of review applies to the constitutional claims of prison inmates. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. With the possible exception of claims under the Eighth Amendment, this reasonableness measure is "a *unitary*, deferential standard for reviewing prisoners' constitutional claims." *Shaw* v. *Murphy*, 532 U.S. at 229 (emphasis added).[1]

1. In fact, *Turner* itself chose not to distinguish among constitutional rights by creating a hierarchy of standards of review. In *Turner*, the Court began its consideration of

[1] *See, e.g.*, *Overton* v. *Bazzetta*, 539 U.S. 126, 140 (2003) (Thomas, J., concurring in the judgment) ("The only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishment of the Eight Amendment, and *Turner* cited neither that Clause nor the Court's precedents interpreting it."). This exception to *Turner*, if it were to be recognized by the Court, could not possibly justify a different standard for claims based on other constitutional provisions.

prison-based constitutional claims by confirming that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. The Court observed that it was beyond dispute that prisoners retain the guaranties and protections of the First Amendment (noting, as an example, that prisoners have the right to petition the government for redress of grievances), the Due Process Clause (citing *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Haines* v. *Kerner*, 404 U.S. 519 (1972) (per curiam)), and the Equal Protection Clause, (prison inmates "are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment" (citing *Lee* v. *Washington*, 390 U.S. 333 (1968)). *Id.* at 84. Thus, the Court's task was to formulate a standard of review responsive to both the rights of prison inmates and the needs of prison officials, who must deal with increasingly complex and difficult administrative problems. *Id.* Both before and after *Turner*, reasonableness has been the key to the Court's settlement of this long-standing constitutional tension.

The Court responded to these competing concerns by formulating a unitary reasonableness standard. Though *Turner* involved challenges based on the First Amendment and the Due Process Clause, the Court, as its reference to *Lee* makes clear, anticipated race-based equal protection claims. The Court, nevertheless, concluded that a prison regulation is valid if reasonably related to a legitimate penological interest, regardless of the constitutional origin of the right with which it interferes. *Id.* at 89.

Moreover, the Court expressly refused to rule that the reasonableness standard applies only in cases in which the restrictions are directed to presumptively dangerous activities. Indeed, in its brief to the Court in *Turner*, the United States explained that such a distinction makes little sense:

> Convicted and imprisoned felons necessarily lose not only those rights that are obviously inconsistent with

> incarceration, but also those rights that are inconsistent with the safety of prison personnel and other prisoners, the protection of prison property, the administration of a large and complex facility, and the achievement of penological objectives, including deterrence and rehabilitation.

Brief of United States as *Amicus Curiae* Supporting Petitioners at 13-14, *Turner* v. *Safley*, 482 U.S. 78 (1987) (No. 85-1384). This Court agreed with the United States and concluded that a right's consistency with proper incarceration is merely a *factor* to be considered as part of the reasonableness inquiry. Specifically, this Court noted that the judgment that some rights warrant greater protection than others is really "a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns. It therefore provides a tenuous basis for creating a hierarchy of standards of review." *Turner*, 482 U.S. at 89.

2. Moreover, the rationale underlying *Turner*—that the uniquely volatile nature of the prison environment makes deference to prison authorities necessary—applies to equal protection claims as much as it applies to claims under the First Amendment.

The *Turner* standard was based on this Court's understanding that prison administrators face complex and difficult challenges in ensuring the security and safety of the prison environment. *Turner*, 482 U.S. at 84 (prison administrators need deference "to deal with the increasingly urgent problems of prison administration and reform"). As this Court has previously stated in *Procunier* v. *Martinez*, 416 U.S. 396 (1974), "[p]rison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication." *Id.* at 404. And

moreover, as this Court later explained, "prison administrators are . . . under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

In its analysis of precedent, moreover, *Turner* rejected the idea that equal protection claims warrant a stricter standard of scrutiny than other constitutional claims. One of the decisions the Court relied upon was *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *see Turner*, 482 U.S. at 86-88. There, the Court addressed an equal protection claim by inmates who sought to form a labor union. The district court had struck down prison regulations prohibiting correspondence and meeting rights related to union activity on the ground that "this was a denial of equal protection because bulk mailing and meeting rights had been extended to the Jaycees, Alcoholics Anonymous, and the Boy Scouts." 433 U.S. at 133. But this Court disagreed. It determined that prison administrators should be given "the full latitude of discretion, unless it can be firmly stated that . . . discretion has been abused." *Id.* at 136.

As it would later do in *Turner*, the *Jones* Court rejected a more rigorous standard of review as "inconsistent with the deference federal courts should pay to the informed discretion of prison officials." *Id.* Where prison security is at issue, the Court was not prepared to offer equal protection claims stricter scrutiny than other constitutional claims. "There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." *Id.*

In short, the rationale underlying *Turner* is the difficulty of maintaining order within the prison context. That concern is not of lesser moment because a petitioner brings an equal protection claim rather than challenging a prison regulation under the First Amendment or Due Process Clause. This Court, accordingly, has consistently refused to confine the

Turner reasonableness standard to any subset of constitutional claims.

3. This Court's subsequent decisions have solidified *Turner*'s conclusion that all constitutional claims by prison inmates are subject to a reasonableness inquiry. In *O'Lone* v. *Estate of Shabazz*, 482 U.S. 343 (1987), decided the same term as *Turner*, this Court held that the application of the *Turner* test did not turn on the question of whether the right allegedly violated is inconsistent with prison safety. The Court rejected, as it had in *Turner*, the argument that "more rigorous scrutiny is appropriate unless a court can conclude that the activity for which prisoners seek protection is 'presumptively dangerous.'" *Id.* at 349 n.2 (citing *Turner*, 482 U.S. at 89).[2]

Similarly, in *Washington* v. *Harper*, the Court reiterated that the *Turner* standard applies to "*all* circumstances in which the needs of prison administration implicate constitutional rights." 494 U.S. at 224 (emphasis added). There, the Court used the reasonableness standard to review the claim of a mentally ill prisoner challenging a prison policy that authorized his treatment with antipsychotic drugs. Rejecting the position that a higher standard of review was required because of the highly intrusive nature of antipsychotic drug treatment, *id.* at 218, the Court confirmed that a deferential standard of review best accommodates the competing principles that make the prison context a unique one. The Court explained that *Turner* applies "in *all* cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the

[2] The Court has been no more receptive to the argument "that heightened scrutiny is appropriate whenever regulations effectively prohibit, rather than simply limit, a particular exercise of constitutional rights." As the Court put it in *O'Lone*, "the presence or absence of alternative accommodations of prisoners' rights is properly considered a factor in the reasonableness analysis rather than a basis for heightened scrutiny." 482 U.S. at 349 n.2 (citing *Turner*, 482 U.S. at 88, 90-91).

First Amendment." *Id.* at 224 (emphasis added). Simply put, it does not matter whether "the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Id.* at 223.[3]

Turner and its progeny thus unequivocally demonstrate that prison policies that implicate the constitutional rights of prisoners—no matter what the source or nature of the right—are constitutional as long as they are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

B. This Court's Precedents Provide No Basis For An "Equal Protection Exception" To The *Turner* Standard.

Contrary to Petitioner's position, *see* Pet'r Br. at 24-27, this Court has never held or suggested that prison-based racial equal protection claims are subject to strict scrutiny. In adopting a "unitary" reasonableness standard for prison-based

[3] On a number of other occasions as well, the Court has steadfastly refused to create a hierarchy of standards of review based on the nature of the right alleged to have been infringed or the nature and degree of governmental infringement. *See, e.g., Overton v. Bazzetta*, 539 U.S. at 131 ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner."); *McKune v. Lile*, 536 U.S. 24, 36 (2002) ("A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction."); *Lewis v. Casey*, 518 U.S. 343, 361 (1996) (Turner's principle of deference has "special force" with regard to disciplinary and security concerns); *Thornburgh v. Abbott*, 490 U.S. 401, 409-10 (1989) ("[A] strict standard simply [is] not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons."). This refusal to create a hierarchy of constitutional rights in the prison context is consistent with the Court's general position that there is "no principled basis on which to create a hierarchy of constitutional values." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *City of Newport, Ky.* v. *Iacobucci*, 479 U.S. 92, 99 n.1 (1986) (per curiam) (Stevens, J., dissenting) ("all constitutional values are equivalent").

constitutional claims, including equal protection claims, the *Turner* Court articulated what was, implicitly, the standard of review controlling prison-based racial protection claims.

1. Petitioner relies most heavily on *Lee* v. *Washington*, arguing that "[t]he appropriate standard of review here is mandated . . . by the specific holding in *Lee*, where the Court affirmed that racial segregation of prison inmates violates the Fourteenth Amendment and is presumed invalid unless it survives strict scrutiny." Pet'r Br. 20. But *Lee* affirms no such thing.

In fact, *Lee* neither expressly nor implicitly applied strict scrutiny to prison-based equal protection claims. There, this Court, in a per curiam opinion, affirmed the district court's judgment ordering the desegregation of state prisons and jails. *Lee*, 390 U.S. at 333-34. The Court provided no analysis of the pertinent standard.

Moreover, the district court's decision, which this Court adopted, did no more than establish that a state law mandating the "complete and permanent segregation" of state prisons violates the Equal Protection Clause. *Washington* v. *Lee*, 263 F. Supp. at 331. Observing that "it is no longer open to question that a State may not constitutionally require segregation of public facilities," *id.* (internal quotation marks and alteration omitted), the district court went on to conclude that "no consideration of prison security or discipline [would] sustain the constitutionality of state statutes that on their face require *complete and permanent* segregation of the races in *all* the Alabama penal facilities," *id.* (emphasis added).

Thus, the district court restricted its opinion to claims involving segregation that is complete, permanent, and universally applied throughout a state prison system. Its analysis anticipated—and is consistent with—the *Turner* standard in its suggestion that such an arbitrary state policy is not and cannot be reasonably related to "consideration[s] of prison security or discipline."

Of particular pertinence here, the district court added that temporary segregation *would* be constitutionally permissible if supported by such considerations. Indeed, the court noted that in some instances "prison security and discipline *necessitates* segregation of the races." 263 F. Supp. at 331 (emphasis added). The court cited the example of the so-called "tank" in the City of Birmingham, where inmates were temporarily segregated by race. *Id.* at 331 n.6.

This Court's affirmance of the district court's decision was, in more general terms, an affirmation that the distinction between "complete and permanent segregation" and temporary segregation reasonably related to "consideration[s] of prison security and discipline" is practically necessary and constitutionally sound. The Court accepted the district court's decision in part on the ground that "the specific [district court] orders directing desegregation of prisons and jails make . . . allowance for the necessities of prison security and discipline." *Lee*, 390 U.S. at 333-34. In other words, the Court approved a desegregation plan for state prisons that allowed for temporary and limited race-based solutions to "the intractable problems of prison administration." *Turner*, 482 U.S. at 89.

In a concurring opinion, Justices Black, Harlan, and Stewart made the same point, though with greater emphasis:

> In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.

Lee, 390 U.S. at 334 (Black, Harlan, Stewart, JJ., concurring).

In short, nothing in this Court's opinion in *Lee*, or in the district court decision that it affirmed, suggests a blanket

holding that all racial distinctions made by prison authorities require strict scrutiny.

2. Petitioner and his *amici* also make much of the fact that, in other contexts, this Court has sometimes used the unqualified language of color-blindness in dealing with affirmative action claims. *See* Pet'r Brief 15-20, 23, 27-32, citing, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (higher education); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (higher education); *Adarand Constructors, Inc.* v *Peña*, 515 U.S. 200 (1995) (government contracting); *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (government contracting). Respondent does not dispute that strict scrutiny governs race-based classifications in such contexts. But nothing in those decisions, or in the opinions of individual Justices, suggests that the *Turner* standard has been or should be overruled with respect to race-based equal protection claims in prisons.

For example, Petitioner relies heavily upon this Court's statement that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); Pet'r Brief at 15. Petitioner fails to note, however, that this statement was responding to the assertion that so-called "benign" racial preferences are subject to something less than strict scrutiny. Specifically, the quoted language originated in this Court's decision in *Adarand*, in which the Court rejected the portion of *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), holding that the race of the preferred individual was "critical to the determination of which standard of review to apply." *Adarand*, 515 U.S. at 226-227. The Court overruled this holding with the statement that "all racial classifications" are subject to strict scrutiny—not just those that favor whites over blacks. *Id.*; *accord Grutter*, 539 U.S. at 353 (Thomas, J., dissenting).

Obviously, this statement and others like it were not designed to overrule, *sub silentio*, the Court's holding in

Turner and its progeny that, in the uniquely volatile prison context, the "reasonable relationship" test applies to "*all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington* v. *Harper*, 494 U.S. at 224 (emphasis added). Such a reading of these statements would be especially inappropriate in light of this Court's repeated recognition that the prison context is unique. *See Thornburgh* v. *Abbott*, 490 U.S. at 407 (the rights of prison inmates "must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration.") (quoting *Turner*, 482 U.S. at 85).[4]

In sum, this Court should follow its prior precedents and decline to create a hierarchy of standards of review for prison-based constitutional claims. To do otherwise would require a stark departure from *Turner* as well as a host of other decisions.

II. APPLICATION OF THE *TURNER* STANDARD TO EQUAL PROTECTION CLAIMS OF THE SORT RAISED BY PETITIONER IS ESPECIALLY JUSTIFIED.

Creating an equal-protection "exception" to *Turner* would be equally inappropriate as a matter of policy. As shown below, racially motivated violence is one of the most intractable problems in American prisons. Prison

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[4] It would be difficult, indeed, to find a context analogous to the world behind prison walls. As one commentator has pointed out, for example, prisons cannot be analogized to schools because "they have different populations, different social functions, and different administrative problems. Behavior taken for granted in prisons would be considered aberrant in schools, indeed, probably in all other social contexts. No other institution so thoroughly controls and regiments its inmates or clients, denying them privacy and freedom of choice. In no other institution are relations so fraught with violence. It is a serious mistake to believe that what makes sense in the educational environment is appropriate for prisons." James B. Jacobs, *New Perspectives on Prisons and Imprisonment* 86-87 (1983).

administrators must have the discretion that *Turner* gives them to address this pressing concern. At the same time, the *Turner* standard is sufficiently rigorous to ensure that prison administrators will not be able to make racial classifications unrelated to legitimate penological objectives.

A. The *Turner* Standard Is Necessary To Ensure That Prison Authorities Can Address The Urgent Problem Of Race-Related Prison Violence.

1. Contrary to the position of Petitioner and his *amici*, *see* Pet'r Br. at 8 n.5, 34; Brief of Former State Corrections Officials as *Amici Curiae* in Support of Petitioner ("Corrections Officials' Brief") at 5-6, 10-16, there is a significant body of evidence that much of the violence in prison is motivated by racial hostility and perpetrated by race-based gangs.

As one commentator put it, "[a]nyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism . . . . Protecting staff from prisoners and prisoners from each other is a constant challenge." *Stefanow* v. *McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996); s*ee also Dawson* v. *Delaware*, 503 U.S. 159, 173 n.1 (1992) (Thomas, J., dissenting) (citing cases and scholarly writings that have taken note of prison-based racial violence).[5]

Indeed, "racial avoidance and conflict [is] the most salient aspect of the prisoner subculture." James B. Jacobs, *New*

[5] In *Turner*, the particularized circumstance that gave rise to restrictions on prison correspondence was "a growing problem with prison gangs." 482 U.S. at 91. Witnesses testified that "restricting communications among gang members, both by transferring gang members to different institutions and by restricting their correspondence, was an important element" in a strategy of "separating and isolating gang members." *Id.* at 91-92; *see also Thornburgh* v. *Abbott*, 490 U.S. at 412 (possession of subscription publications may allow other inmates to draw inference about gang affiliation.)

Perspectives on Prisons and Imprisonment 67 (1983). "Inside the prison interracial hostilities intensify because intraracial peer groups completely dominate the lives of the prisoners. Few, if any, other activities or interests compete for a prisoner's energies." *Id* at 71. In fact, for many prisoners, their criminal identity has been supplanted with a racial-ethnic one. John Irwin, *The Felon* 80-82 (1970).

The problem, moreover, is growing. The racial subculture of prison life "is an extension of gang life" on the outside. Jacobs, *supra*, at 71; *see, e.g.*, Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 Am. U. L. Rev. 41, 55-56 (1987) (prison population "is divided among identifiable gangs openly tied to Black, white, and Hispanic gangs simultaneously operating in the streets"). Accordingly, with gang membership in general on the rise, the proportion of prisoners affiliated with a prison gang has risen considerably over the last decade *See* National Criminal Justice Reference Service, *Gang Resources* 1, *available at* http://www.ncjrs.org/gangs/summary.html (last visited Aug. 6, 2004) ("According to a 1999 survey by the National Gang Crime Research Center, gang membership within adult state correctional facilities increased from 9.4% in 1991 to 24.7% in 1999."). And these racially separated gangs "are believed to be responsible for much of the violence in prisons." Scott N. Tachiki, Comment, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 Cal. L. Rev. 1115, 1126 (1995). Race-based prison gangs have "an endless capacity for violence. Gangs systematically rape and murder both prisoners who are not gang members and guards who interfere with their activities." Willens, *supra*, at 55-56.

2. The viciousness of race-based, gang-related prison violence is aptly demonstrated by the facts of *State* v. *Kell*, where a white supremacist savagely murdered an African

American inmate. 61 P.3d 1019, 1024-25 (Utah 2002). The Utah Supreme Court was appropriately shocked by the heinous nature of the attack:

> For over two and a half minutes, defendant slashed Blackmon with his shank, inflicting sixty-seven stab wounds . . . . Despite Blackmon's pleas to stop, defendant continued the assault and, in fact, after walking away, returned twice to inflict more wounds, until Blackmon lay motionless on the floor of the cell block.

Id. at 1025. The defendant in that case had previously "been involved in race-related altercations with several African-American inmates," *id.* at 1024, and there can be little doubt that the ferocity of the attack was motivated by the defendant's hatred of African Americans. And this case is just one of many that demonstrates that race-based prison violence is quite literally a matter of life and death.

3. Closely related to the problem of race-related gangs is the problem of inter-racial rape in prisons. Numerous studies of prison violence, including an exhaustive study of male rape by Human Rights Watch, have noted that inter-racial rape has reached epidemic proportions. *See* Human Rights Watch, United States, *No Escape: Male Rape in U.S. Prisons* (2001), *available at* http://www.hrw.org/reports/2001/prison/report.html.

Moreover, negligent celling, including celling together men who are "racially antagonistic," is one of several factors that increase the threat of prisoner rape. *Id.* at ch. VIII; *see also* Brief of Stop Prisoner Rape as *Amicus Curiae* in Support of Petitioner, *Farmer* v. *Brennan*, 511 U.S. 825 (1994) (No. 92-7247) (discussing race as a risk factor in prisoner rape); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. &

Criminology 127, 158-65 (2001) (citing studies that indicate "a clear relationship between race and prisoner rape").

In short, racial conflict and race-related violence within prisons is a national problem. *See* Jacobs, *supra*, at 71 ("In every region of the country, race is the most important determinant of an individual's prison experience.").[6]

4. Given the extent of racial violence associated in our Nation's prisons, it is no exaggeration to say that the discretion given to prison administrators under the *Turner* standard may be necessary to protect the safety—indeed, to protect the lives—of prison inmates. In fact, given the prevalence of racial violence, the failure to take segregative

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[6] The California Department of Corrections has faced particularly serious gang-related racial conflict. The state prison system is dominated by race-based prison gangs. *See* Willens, *supra*, at 56 n.69 (California is one of three prison systems most dominated by gangs); Jacobs, *supra*, at 68 (citing studies of racial polarization within the California prison system). And the problems caused by gang activity are "the chief operational fact of life inside California prisons." John J. Dilulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* 129 (1987). As one commentator has noted, "[f]or years in states such as California . . . prison gangs have terrorized fellow inmates, injured and killed staff members, trafficked in drugs and disrupted the delivery of prison services." *Id.* at 249. The result has been a series of "never-ending race wars." Micha Maguire, *Racism II, in Inside: Prison American Style* 84, 84 (Robert J. Minton, Jr. ed., 1971). Accordingly, inmate accounts of prison life within the California system describe a violent world where prisoners must racially self-segregate if they are to survive. *See* Frank L. Rundle, *The Roots of Violence at Soledad, in The Politics of Punishment: A Critical* Analysis of Prisons in America 163, 167-68 (Erik Olin Wright ed., 1973).

Given the dominance of prison gangs within the California prison system, it is hardly surprising that the CDC has been the scene of a "high level of racial violence." *Johnson*, 321 F.3d at 800 n.9 (describing numerous incidents of racial violence within the California prison system). For his part, moreover, Petitioner neither disputes that prison gangs are a fact of life in California prisons nor "disagree[s] that racial violence is pervasive in the CDC." *Id.* at 802.

measures "could be considered 'deliberate indifference' to prisoners' safety and could itself constitute a constitutional violation." *Johnson*, 321 F.3d at 807. *See Robinson v. Prunty*, 249 F.3d 862 (9th Cir. 2001) (triable issue as to whether prison officials were deliberately indifferent to an excessive risk that prisoner would be harmed when he was placed in an integrated yard); Jacobs, *supra*, at 97-98 (policy of random cell assignment without regard to the reality of interracial violence could be viewed as deliberate indifference).

5. In light of the widespread and serious problem of racially motivated violence, moreover, a prison administrator could reasonably believe that it is both wise and responsible to avoid celling together new inmates of different races until the prison has an opportunity to determine their propensity for engaging in such violence. In fact, it is not obvious, as Petitioner and his *amici* suggest, that temporary segregative measures are ineffective in reducing interracial violence in prisons.

First, there is no consensus among prison experts that temporary segregative measures are ineffective. *See* Corrections Officials' Brief at 18-19. While it is true that *some* prison officials believe that total and complete integration is the best policy for avoiding racial violence, other officials disagree with this conclusion. In fact, 30 percent of wardens at maximum security prisons have expressed the belief that integrating individual prison cells "is likely to increase the level of violence in an institution." Martha Henderson et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295, 304 tbl. 5 (2000).[7]

[7] There is good reason why prison administrators disagree about the relationship between temporary segregative measures and racial violence. It is safe to say that, in terms of racial dynamics, no two prisons are alike:

> There is surely too much variation in overcrowding, administrative capacity, and prisoner subculture to expect a single rule of thumb to suffice. Even if prisons were identical in all of these respects, the fact that some contain prisoner populations with nearly equal numbers of [racial sub-groups], while others have a single race overwhelmingly in the majority, suggests that there will be different patterns of racial conflict and different strategies for control.

Jacobs, *supra*, at 81.

Petitioner and his *amici* expect this Court to second-guess the judgments of these seasoned prison administrators on what is potentially a matter of life and death.

Moreover, prior experience supports the conclusion that integration, undertaken with insufficient care by prison officials, can lead to increased violence. For example, in *White* v. *Morris*, the U.S. District Court for the Southern District of Ohio explained how integration contributed to a devastating prison riot:

> On April 11, 1993, the worst prison riot in Ohio history, and one of the worst in the United States history, erupted at the Southern Ohio Correctional Facility ("SOCF"). Nine inmates and one corrections officer were murdered and many others were injured during the eleven day standoff. During negotiations as well as after the riot, prisoners repeatedly cited integrated celling as a factor contributing to the tense atmosphere at SOCF. Among the demands the prisoners made as part of their agreement to end the siege, was that [the policy of integrated celling] be reviewed.

832 F. Supp. 1129, 1130 (S.D. Ohio 1993). While the Ohio experience may not be repeated in every case, it clearly suggests that, in some cases, integration can worsen already severe racial tensions in prisons.

6. The ongoing debate between prison officials about the best way to reduce racial violence in prisons demonstrates forcefully why federal courts should not subject prison policies to strict scrutiny. While penologists may disagree about the efficacy of particular measures to reduce racially based prison violence, it is the job "of prison administrators . . . and not the courts, to make the difficult

judgments concerning institutional operations." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 128. The federal courts are not in a better position than prison administrators to determine how best to reduce racial violence in prisons.

Indeed, this Court has often stated that questions of prison safety are "peculiarly within the province of the legislative and executive branches, of government," *Turner*, 482 U.S. at 84-85, and not within the expertise of the courts. *See, e.g.*, *Procunier* v. *Martinez*, 416 U.S. at 404-05; *Pell* v. *Procunier*, 417 U.S. at 827. And federalism concerns strongly "counsel a policy of judicial restraint" where a state penal system is involved *Turner*, 482 U.S. at 85 ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."); *see also Lewis v. Casey*, 518 U.S. at 387 (Thomas, J., concurring) ("State prisons should be run by state officials with the expertise and the primary authority for running such institutions.").

The problem with strict scrutiny in this context is, as this Court put it in *Turner*, that it would make courts "the primary arbiters of what constitutes the best solution" to the problems of prison administration. 482 U.S. at 89. Simply put, such a rule would place impossible burdens on prison administrators:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.

Id.

In short, subjecting equal protection claims to strict scrutiny would fail to accord deference to the appropriate prison authorities. That would make "an already daunting task virtually impossible." *Lewis* v. *Casey*, 518 U.S. at 387 (Thomas, J. , concurring).[8]

B. The *Turner* Standard Is Sufficient To Prevent Invidious Discrimination.

Finally, Petitioner and his *amici* are wrong to suggest that adherence to the *Turner* standard in this context will give prison administrators license to engage in invidious discrimination under the guise of protecting prison security. This Court adopted the *Turner* standard "with confidence that . . . a reasonableness standard is not toothless." *Thornburgh v. Abbott*, 490 U.S. at 414 (internal quotation marks omitted). The *Turner* standard is designed to "smoke out" arbitrary or irrational state actions. *See Turner*, 482 U.S. at 89-90 ("[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."). And it is fully capable of discerning illegitimate uses of racial criteria.

In *Turner* itself, the Court struck down a regulation restricting the rights of prisoners to marry as an "exaggerated response to . . . security objectives." *Id.* at 98. There is no

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[8] Petitioner's claim would affect not only racial classifications but also all classifications which require equal protection analysis. A separate standard for equal protection claims could not logically be limited to racial classifications, but would require close, equal-protection scrutiny of all forms of prison classifications. Prison administrators would be required to more carefully examine classifications based upon a prisoner's gender, *see, e.g.*, *Pitts* v. *Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (applying heightened scrutiny to prison-based claims of gender discrimination), and would have to closely examine differential treatment of prisoners with mental and physical impairments. *Cf. City of Cleburne, Tex.* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

reason to think that similarly arbitrary or irrational measures, including raced-based ones, will not meet a similar fate.

Far from giving governmental authorities license to trample on the constitutional rights of prison inmates, the *Turner* test requires prison officials to articulate the "particularized circumstances" that justify a restriction on a prisoner's rights. *See, e.g., id.* at 91-93 (testimony at trial supports contention that correspondence provision was promulgated primarily for security reasons); *cf. Thornburgh* v. *Abbott*, 490 U.S. at 419 ("prison officials [must be] able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm"). The relevant factors identified in *Turner* "serve to channel" the reasonableness inquiry, *id.* at 414, ensuring that prison authorities do not enjoy the kind of "unbounded discretion [that] carries with it grave potential for abuse." *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting).

Thus, while *Turner* gives broad discretion to prison officials to prevent disorder, *see Shaw v. Murphy*, 532 U.S. at 232; *Thornburgh v. Abbott*, 490 U.S. at 413, it does not give them free range to presume or speculate, or to invent security rationales at odds with common sense. Nor is a "generalized or vague fear of racial violence . . . a sufficient justification for a broad policy of racial segregation." *Sockwell* v. *Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (citing *United States* v. *Wyandotte County, Kan.*, 480 F.2d 969, 971 (10th Cir. 1973)) (relying on *Lee* to strike down "general policies of racial segregation in prison housing and administration").

Applying *Turner*, courts will be able to prevent arbitrary, pretextual uses of race, as they have in the past. *See Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (rejecting magistrate's grant of summary judgment where magistrate "simply chose to believe the conclusory statements by the prison officials that they had confined [a black inmate] merely for security reasons"). For example, the *Turner* factors

would preclude complete and permanent segregation of the races in violation of *Lee*, 390 U.S. at 333-34. And *Turner* would clearly not allow prison officials to justify the preferential treatment of one race. *See Johnson*, 321 F.3d at 799 n.7 (racially preferential treatment "could not be sustained as neutral").[9]

To be sure, there is little doubt that some measures taken in response to the unique requirements of prison administration "would raise grave . . . concerns outside the prison context." *Thornburg* v. *Abbott*, 490 U.S. at 407. *See also Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 133 n.9 ("The informed decision of prison officials that there is potential danger may be sufficient for limiting rights even though this showing might be 'unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public.'") (ellipsis in original) (quoting *Pell* v. *Procunier*, 417 U.S. at 825). What is clear, however, is that while *Turner* gives

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[9] With regard to race-based equal protection claims, the "bite" of *Turner* was borne out in *Morrison v. Garraghty*, in which the Fourth Circuit struck down a prison policy that gave preference to prisoners of Native American heritage. 239 F.3d 648 (4th Cir. 2001). There, a prison inmate alleged that his equal protection rights had been violated when his request to obtain Native American religious items was denied because he was not of Native American heritage. The Fourth Circuit found that prison authorities had "failed . . . to demonstrate that the race-based . . . policy [was] reasonably related to this legitimate penological interest." *Id.* at 660. The court noted that while prison officials "perhaps could have prohibited inmate possession of the requested items because they threaten prison safety and security, they have chosen not to do so." *Id.* The policy at issue "allow[ed] consideration of requests for religious exemptions from the personal property restrictions submitted by Native American inmates . . . but which unequivocally denies non-Native Americans . . . the same consideration solely on the basis of their lack of membership in the Native American race." *Id.* The Court considered the claim that such a policy promoted prison security and, under the *Turner* standard, concluded that the prison policy was not "rationally related to the goal of prison safety." *Id.*

prison officials the "ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," 482 U.S. at 89, *Turner* also gives courts the power to smoke out constitutionally illegitimate uses of race.

* * * *

Almost two decades ago, this Court adopted a deferential standard that it understood would apply, and subsequently interpreted as applying, to *all* non-Eighth Amendment constitutional claims challenging conditions of confinement in the Nation's penal institutions. There simply is no basis in law or sound policy for this Court to revisit that conclusion by creating a potentially limitless and dangerous "exception" for equal protection claims. If anything, the increase in gang-related activity and prison violence since *Turner* make it even more important to adhere to the standard adopted there. If prison officials are to be subjected to a higher standard when dealing with the inherent tension between constitutional values and the needs of prison security, that standard should be imposed by a duly authorized legislative or executive authority, not by the federal courts.

CONCLUSION

The decision by the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

GENE C. SCHAERR*
ROBERT KLINCK
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W
Washington, D.C. 20005
(202) 736-8000

TROY KING
ATTORNEY GENERAL OF ALABAMA
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

GREGG D. RENKES
ATTORNEY GENERAL
STATE OF ALASKA
P.O. Box 110300
Juneau, AK 99801
(907) 465-2133

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

ATTORNEY GENERAL
BRIAN SANDOVAL
STATE OF NEVADA
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

KELLY A. AYOTTE
ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE
33 Capitol Street
Concord, NH 03301
(603) 271-3655

WAYNE STENEHJEM
ATTORNEY GENERAL OF
NORTH DAKOTA
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210